Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-95

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—v.—

PHILLIP GOGGINS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

EUGENE GOLD
District Attorney, Kings County
Attorney for Petitioner
400 Municipal Building
Brooklyn, New York 11201
(212) 643-5100

ROGER BENNET ADLER
Assistant District Attorney
Of Counsel

INDEX

	PAGE
Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of Facts	3
POINT I—Disclosure of the confidential informant's identity was constitutionally and procedurally unwarranted. The Court of Appeals has misconstrued, misapplied, and overly extended this Court's decision in *Roviaro* v. *United States* (353 U.S. 53) far beyond constitutional imperatives	4
POINT II—*In camera* examination of a confidential informant as a condition precedent to the revelation of his identity is neither violative of the right of confrontation nor the right to the effective assistance of counsel	9
CONCLUSION	13
APPENDIX	
A—Opinion of the Court of Appeals, State of New York	1a
B—Order of Reversal of the Appellate Division, Second Department	15a
C—Opinion of the Appellate Division, Second Department	17a

CITATIONS

PAGE

Cases:

Alderman v. *United States*, 394 U.S. 165 (1969) 12

Brady v. *Maryland*, 373 U.S. 83 (1963) 7, 8

Gilmore v. *United States*, 256 F.2d 565 (5th Cir. 1958) 7

Jencks v. *United States*, 353 U.S. 657 (1957) ... 12

McLawhorn v. *State of North Carolina*, 484 F.2d 1 (4th Cir. 1973) 11

People v. *McShane*, 50 Cal. 2d 802, 330 P.2d 33 (1958) 7

Price v. *Superior Court*, 83 Cal. Rptr. 369, 463 P.2d 721 (Cal. Sup. Ct.) 8

Roviaro v. *United States*, 353 U.S. 53 (1957) 2, 4, 5, 7, 9, 12

State v. *Davis*, Mo., 450 S.W. 2d 168 (1970) 8

State v. *Roundtree*, 118 N.J. Super. 22, 285 A.2d 564 (1971) 8

United States v. *Alvarez*, 472 F.2d 111 (9th Cir. 1973) *cert.* den. 93 S. Ct. 2742 (1973) 6

United States v. *Bell*, 464 F.2d 667 (2d Cir. 1972), *cert. den.* 409 U.S. 991 11

United States v. *Clark*, 482 F.2d 103 (5th Cir. 1973) 6

United States v. *Davis*, 487 F.2d 1249 (5th Cir. 1973) 6

United States v. *Day*, 384 F.2d 464 (3d Cir. 1967) 11

United States v. *Hurse*, 453 F.2d 128 (8th Cir. 1972) 6

United States v. *Jackson*, 384 F.2d 825 (3d Cir. 1967), *cert.* den. 392 U.S. 933 11

PAGE

United States v. *James*, 466 F.2d 475 (D.C. Cir. 1972) 6

United States v. *Kelly*, 499 F.2d 329 (9th Cir. 1972) 6

United States v. *Lopez*, 328 F. Supp. 1077 (E.D. N.Y. 1971) 11

United States v. *Poms*, 484 F.2d 919 (4th Cir. 1973) 6

United States v. *Ortega*, 471 F.2d 1350 (2nd Cir. 1972) 6

United States v. *Roberts*, 388 F.2d 646 (2d Cir. 1968) 8

United States v. *Russ*, 362 F.2d 843 (2d Cir. 1966), *cert. den.* 385 U.S. 923 (1966) 6

United States v. *Skeens*, 499 F.2d 1066 (D.C. Cir. 1971) 6

United States v. *Soles*, 482 F.2d 105 (2d Cir. 1973) 7

United States v. *Winters*, 420 F.2d 523 (3d Cir. 1970) 11

United States ex rel Abbott v. *Twomey*, 460 F.2d 400 (7th Cir. 1972) 6

UNITED STATES CONSTITUTION

Sixth Amendment 2, 10

MISCELLANEOUS

Amended Proposed Federal Rules of Evidence, for the United States District Courts and Magistrates, Rule 510 (56 F.R.D. 183, 255) 10, 12

Williams, The Defense of Entrapment and Related Problems in Criminal Prosecution, 28 Fordham L. Rev. 399 [13a] 13

IN THE

Supreme Court of the United States

October Term, 1974

No.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—v.—

PHILLIP GOGGINS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Statement

The District Attorney of Kings County, on behalf of the People of the State of New York, petitions for a writ of certiorari to review a judgment of the Court of Appeals of the State of New York* which affirmed an order of the Appellate Division, Second Department which reversed a judgment of conviction rendered in Supreme Court, Kings County convicting Respondent of the sale and possession of dangerous drugs.

* Decided May 15, 1974.

Opinions Below

The opinion of the Court of Appeals (Appendix A, pp. 1a-14a) is reported at 34 N Y 2d 163. The opinion of the Appellate Division, Second Department (Appendix C, pp. 17a-24a) is reported at 42 A.D. 2d 227.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Did the New York Court of Appeals misconstrue and overly extend this Court's holding in *Roviaro* v. *United States* (353 U.S. 53), by requiring the State to reveal the identity of its confidential informant who merely acted as a catalyst in a prosecution for the sale and possession of dangerous drugs?

2. Whether the confrontation and counsel clauses of the Sixth Amendment prohibit *in camera* examination of a confidential informant as a condition precedent to a finding that the informant could offer relevant and helpful information to the defense and prior to revelation of the informant's identity?

Constitutional Provision Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

against him . . . and to have the assistance of counsel for his defense."

Statement of Facts

PATROLMAN LUTHER BARNES a member of the New York City Police Department's Narcotics Division was utilized in an undercover capacity. Dressed in the garb peculiar to buyers of drugs his job required that he associate himself with known narcotic pushers and to purchase narcotics from them. Prior to the investigation and prosecution at bar, Barnes had made approximately one hundred dangerous drug purchases in the course of his duties.

On March 18, 1970 while working with a team of narcotics officers he entered a bar and grill with his confidential informant. The latter introduced Barnes to Goggins telling Goggins, "Abdul (Goggins) take care of my man (Barnes)." Barnes ascertained from Goggins that in exchange for $15, he would receive seven glassine envelopes containing heroin. The terms being agreeable the transaction took place outside the bar and grill and at a time when neither the actions or words of buyer or seller could be seen or heard by the informant.

Some five days later Barnes and the informant returned to the bar and grill. Goggins recognized Barnes and motioned for Barnes to come outside with him; Barnes did. Once again the purchase price was seven glassine envelopes for $15 and again the informant was not present during negotiations or at the sale.

Pursuant to a description supplied by Barnes, members of the backup team took Goggins into custody. Barnes

confirmed that the correct person had been arrested by cruising past the arrest scene, outside the bar and grill, and signalling with his headlights that they had the right man. No drugs were found on Goggins' person when he was arrested.

At trial the prosecution's case consisted of Barnes' testimony concerning his words and deeds with Goggins. Detective Lorenzo, a member of the backup team was able to corroborate some of Barnes' testimony but was unable to see the actual transfer.

The prosecution's case did not go unrebutted. Mary Goggins, the defendant's wife claimed that he was at home at the time the sales transpired. Respondent was sworn and testified in his own behalf. He denied using or selling drugs and insisted he was not even at the bar and grill on the dates in question. Following closing statements and the court's charge, guilty verdicts were returned on all counts.

ARGUMENT

POINT I

Disclosure of the confidential informant's identity was constitutionally and procedurally unwarranted. The Court of Appeals has misconstrued, misapplied, and overly extended this Court's decision in *Roviaro* v. *United States* (353 U.S. 53) far beyond constitutional imperatives.

Roviaro v. *United States*, (353 U.S. 53 (1957)) teaches that the privilege not to disclose a confidential informant's identity calls for a balancing of the public interest in pro-

tecting the flow of information to government as and against the individual's right to prepare his defense. As with any balancing test, when the particular facts of any given criminal litigation are coupled with varying applications by appellate courts, different conclusions are susceptible of being reached. The case at bar, however, is of signal import because in applying the balancing test, the appellate courts of New York have travelled well beyond the parameters of *Roviaro* and its progeny, not for reasons of peculiar New York law, but in the belief that *Roviaro* deemed that they must. To this extent the New York courts have been mistaken and place New York in conflict with most federal appeals courts.

At the outset it should be noted that the informant in the *Roviaro* case played a material part in bringing about the transaction which was the subject of *Roviaro's* indictment. Indeed, the informant was actually present at the occurrence of the crime and was the witness in closest proximity to Roviaro during the transaction in question. The informant in *Goggins* was never present when the drug sales transpired and thus was not in a position to give relevant and competent testimony concerning what eventually transpired between Goggins the drug seller and undercover officer Barnes.*

It is also highly significant that in *Roviaro* the informant was the sole participant, other than the accused, in the transaction charged (*Roviaro* v. *United States*, *supra* p. 64) whereas in Goggins the state produced its actual parti-

---

* We agree with Judge Jasen's characterization in his dissenting opinion in the Court of Appeals of the informant as a mere catalyst (14-a).

cipant in the transaction. Significantly, the sales in question occurred on a face-to-face manner on two separate occasions thus rendering the intimations of Judge Wachtler that identification witnesses existed, unfounded.*

At the outset it must not be overlooked that the burden is upon the accused to demonstrate why the privilege of nondisclosure should give way (*United States* v. *Alvarez*, 472 F.2d 111, 113 (9th Cir. 1973) *cert.* den. 93 S. Ct. 2742 (1973); *United States* v. *Kelly*, 449 F.2d 329, 330 (9th Cir. 1972)).

It has long been the practice in the federal courts not to mandate disclosure where the informant played a minor role in the criminal transaction. Thus when the informant neither witnessed the crime nor transacted the criminal business with the defendant, disclosure has been denied (*United States* v. *Russ*, 362 F.2d 843, 844-845 (2d Cir. 1966), *cert.* den. 385 U.S. 923 (1966); *United States* v. *Ortega*, 471 F.2d 1350, 1357-1359 (2d Cir. 1972); *United States* v. *Skeens*, 449 F.2d 1066, 1970 (D.C. Cir. 1971); *United States* v. *James* 466 F. 2d 475, 477 (D.C. Cir. 1972); *United States* v. *Poms*, 484 F. 2d 919, 922-923 (4th Cir. 1973); *United States* v. *Clark*, 482 F. 2d 103, 104 (5th Cir. 1973); *United States ex rel Abbott* v. *Twomey*, 460 F. 2d 400, 402-403 (7th Cir. 1972); *United States* v. *Hurse*, 453 F. 2d 128 (8th Cir. 1972); *United States* v. *Kelly, supra*); *United States* v. *Davis*, 487 F.2d 1249, 1251-1252 (5th Cir. 1973)).

---

* It should not be overlooked, as Judge Jasen noted in his dissenting opinion in the Court of Appeals, that the state made no use at trial of what the informant did or said. The existence of an informant was brought out during the cross-examination of agent Barnes (12-a, n1)

It would appear that where one neither participates in the actual exchange of drugs, nor witnesses the actual transfer, the informant is simply not in a position to render the relevant or helpful testimony which the United States Supreme Court envisioned in *Roviaro.** Any information concerning the Goggins-Barnes transaction could only have been garnered by the informant from hearsay sources. The informant was not present when Barnes purchased the drugs from Goggins. He neither heard nor saw what transpired between buyer and seller. It is nothing more than the rankest speculation to assume that the informant could offer relevant and competent testimony for the defense. Absent some factual allegation that the informant is in a position to offer evidence of an exculpatory or helpful nature (*Brady* v. *Maryland* 373 U.S. 83 (1963)) the trial judge should be deemed to have acted within his discretion in denying disclosure (*United States* v. *Soles*, 482 F.2d 105, 109 (2d Cir. 1973).

The majority opinion of the Court of Appeals cited three decisions (5a) wherein it claimed that where the informant played the role of an active participant in setting the stage, motions for disclosure were proper. As will be developed, the cases, we feel, are distinguishable. The ruling in *Gilmore* v. *United States*, 256 F.2d 565 (5th Cir. 1958) requiring disclosure followed because the informant set the stage for the drug transfer, created an atmosphere of confidence between transferor and transferee, and was within hearing range. The informant's placement in close proximity to a conversation critical to the question of Gilmore's criminal liability was sufficient to require his testimony concerning the overheard conversation.

---

* See *People* v. *McShane*, 50 Cal. 2d 802, 330 P. 2d 33, 36 (1958).

The Court of Appeals' reliance upon the holding in *United States* v. *Roberts*, 388 F. 2d 646 (2d Cir. 1968) is misplaced. The Court of Appeals reversed an order of the District Court and remanded for an evidentiary hearing on the issue whether, apart from the cross-examination of a Government agent, an inquiry concerning an informant's whereabouts was made of responsible Government personnel, and if so, whether that inquiry alone or in conjunction with the interrogation of the agent, amounted to a sufficient request by the defense for the informant's whereabouts. The trial judge's posture on a post-judgment motion for a new trial, and not a review of Judge Cannella's application of Roviaro mandated the remand for further proceedings.

Similarly, in *Price* v. *Superior Court*, 83 Cal. Rptr. 369, 463 P2d 721, 725 (Cal. Sup. Ct.) the decision to order disclosure of the informant was made in the context of his role in overhearing a conversation between persons known by him to have been present at the scene of the shooting in question and, indeed, the strong likelihood of the informant's presence at the shooting.

The testimony of agent Barnes was more than sufficient to support the judgment of conviction. Because this case does not involve a claim of entrapment* or a claimed violation of the obligations set forth in *Brady* v. *Maryland* (373 U.S. 83 [1963]), the only two competent witnesses to the transfer in question, Barnes and Goggins, testified. That the jury chose to believe Barnes and discount Goggins was a proper function of the fact finding process. It

---

* C.F. *State* v. *Davis*, MO. , 450 S.W. 2d 168, 172 (Sup. Ct. 1970); *State* v. *Roundtree*, 118 N.J. Super. 22, 285 A. 2d 564, 568 (App. Div. 1971).

is simply too late in the day to raise the red herring of "informant", speculate on his alleged usefulness, and then vacate an otherwise properly entered judgment of conviction. The privilege against disclosure must often give way, but *in this case* a proper application of the rule laid down in *Roviaro* simply does not dictate or suggest such a result.

POINT II

In camera examination of a confidential informant as a condition precedent to the revelation of his identity is neither violative of the right of confrontation nor the right to the effective assistance of counsel.

Assuming *arguendo* that the facts in this case were sufficient to make a colorable showing that the informant could offer helpful evidence for the defense, we feel that an *in camera* setting is the proper forum for the testing of this assertion. To the extent that the Court of Appeals dismissed such an examination for constitutional reasons (2a) and not for reasons of state policy, the court's misreading violates accepted constitutional doctrine to the prejudice of prosecutor's everywhere.*

In the case at bar, Barnes was introduced to the seller Goggins, by the confidential informant. Goggins apparently had faith and confidence in the latter, for when informant exclaimed "Abdul [Goggins] take care of [sell to] my man [Barnes]," the resolution to deal with a heretofore unknown buyer was cemented.

---

* The resort to *in camera* examination was found acceptable to Justice Hopkins who expressed his views in an accompanying opinion at the Appellate Division level (23a, 24a). We concur in and adopt his reasoning.

That Goggins dealt with Barnes on two separate occasions was established by Barnes' testimony at trial. Absent any factual basis that the informant could offer relevant and helpful testimony*, surely the prosecutor has the right to demonstrate that the motion for disclosure was a ploy or that because of the operative facts in the case, that the informant actually was not in a position to render aid or assistance to the defendant and hence his testimony would not be used. It seems patently unfair to allow prosecutorial efforts to find, train, and prepare people for dangerous work as informants, turn them over to defense counsel for examination and possible use only to find that the defense resolves, subsequent to disclosure that the informant is of no value.

We submit that court conducted *in camera* examination is a fitting and proper theater for the resolution of the disclosure decision where the court makes its determination, from the propounding of submitted questions from opposing counsel. We further submit that the New York appellate courts have misread and misapplied the sixth Amendment confrontation and counsel clauses in ruling out, as matters of constitutional mandate, resort to *in camera* examination as a tool for resolving the competing interests highlighted in *Roviaro*.

Both decisions emanating from several federal circuit courts of appeals and the Amended Proposed Federal Rules of Evidence, Rule 510 (subd. (c), par. (2)) apply with approval the *in camera* concept as an aid in the evaluative balance of competing interests for and against disclosure.

---

* As Judge Jasen noted in his dissenting opinion, it was never explained at trial why disclosure was warranted (12a).

In *United States* v. *Jackson*, 384 F2d 825 (3d Cir. 1967) *cert. den.* 392 US 933 the Court of Appeals discussed and approved *in camera* examinations in developing the facts and resolving the delicate balance of informant's disclosure,

"There [referring to the Court's earlier decision in *United States* v. *Day*, 384 F2d 464 (3d Cir. 1967)] the trial judge conducted an in-camera confrontation with the informer, who was made to take the oath and testify as to any relevant knowledge he had pertaining to the crime. A record of that in camera session was transcribed and sealed so that only an appellate court could have access to its contents. The advantage of the procedure is that it enables the court to view with a keener perspective the factual circumstances upon which it must rule and attaches to the court's ruling a more abiding sense of fairness than could otherwise have been realized." (*United States* v. *Jackson*, *supra* at p. 827; see also *United States* v. *Winters* 420 F 2d 523, 524 (3d Cir. 1970)); *McLawhorn* v. *State of North Carolina*, 484 F2d 1, 5-6 n. 13 (4th Cir. 1973)).

The resort to *in camera* proceedings is a well recognized device in assessing governmental claims of privilege. The recent spate of air piracy and hijacking which culminated in the development of a "highjacker's profile" resulted in an *in camera* procedure to protect its premature divulgence and hence resulting obsolescence unless the interests of justice so require (see *United States* v. *Lopez*, 328 F. Supp 1077 (E.D.N.Y. 1971); *United States* v. *Bell*, 464 F2d 667 (2d Cir. 1972) *cert.* den. 409 U.S. 991).

Although under normal and routine circumstances the defense attorney can and should judge the use and worth

of testimony and evidence,* his primacy is modified when he wades in the pools of privilege matter. Thus, this Court, concededly in a reference by way of *dicta* observed that *in camera* examination may be utilized to resolve the *Roviaro* balancing test (see *Alderman* v. *United States*, 394 U.S. 165, 182 n. 14 [1969]).

A study of proposed Federal Rules of Evidence is worthwhile and enlightening. Rule 510(c)(2) provides for *in camera* machinery to resolve governmental claims of privilege. As the advisory committee noted in its commentary to proposed Rule 510, the *in camera* hearing is a peculiarly well suited forum for allowing the prosecutor to demonstrate why the informer's privilege should be upheld (see 56 FRD, 183, 257-258).

The exclusion of possible use of *in camera* examination because of seeming constitutional impediments was a gross misreading of the sound guidelines utilized by several federal appeals courts and in derogation of proposed federal evidentiary guidelines. Had the New York Court of Appeals concluded either to extend greater due process to those accused of selling dangerous drugs as a reading of New York constitutional, statutory or case law we would not find ourselves as petitioners to this Court. By concluding that they could not constitutionally permit an *in camera* approach, the majority of the Court of Appeals grievously misread the United States Constitution and unwittingly and unfortunately placed an increased unnecessary barrier

---

* See *Jencks* v. *United States*, 353 U.S. 657 (1957).

in the path of responsible prosecutors everywhere who must rely to some degree on informants.*

A constitutional sanction of *in camera* examinations would constitute a vital tool in the arsenal of those who must free the innocent and convict the guilty.

---

* It has been estimated that 95% of all Federal narcotics cases are obtained as a result of the work of informers (Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecutions*, 28 Fordham L. Rev. 399, 403) [13a]. If disclosure may be granted in cases such as this one, future cooperation by informants, who fear retribution, may dry up.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Brooklyn, New York
July, 1974

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

ROGER BENNET ADLER
Assistant District Attorney
of Counsel

APPENDIX A

Opinion of the Court of Appeals State of New York *

COURT OF APPEALS

STATE OF NEW YORK

No. 141 A

THE PEOPLE &c.,

Appellant,

vs.

PHILLIP GOGGINS,

Respondent.

No. 141 B

THE PEOPLE, &c.,

Respondent,

vs.

ROBERT BROWN,

Appellant.

WACHTLER, J.:

Both of these cases raise a common issue concerning a defendant's right to disclosure of the identity of a police informant. In each case the informant introduced an undercover police officer to a drug seller and shortly there-

* Decided May 15, 1974.

after departed from the immediate area. The undercover officer then made a purchase, left the scene, and the defendant was later arrested by other officers relying on information supplied by the undercover agent. At the trial the defendant challenged the reliability of the undercover officer's identification and urged the court that a proper resolution of that issue required that the prosecutor be directed to reveal the identity of the informant who initially brought the parties together.

In *Brown*, where the sale and arrest occurred at the defendant's apartment and the proof of identification was virtually unassailed, the court denied disclosure. In the *Goggins* case, involving a sale and subsequent arrest in or around a public bar, a close identity question emerged at the trial and the appellate division directed that disclosure be made. We affirm in both cases.

Problems created by demand for disclosure of police undercovermen, special police agents, informant witnesses and informant tipsters divide into two categories. The first concerns the establishing of probable cause for arrest and search. As indicated in the companion decision, *People* v. *Darden*, (— N Y 2d —), this category is in a sense procedural and reflects constitutional and policy considerations designed to inhibit unreasonable intrusions on the privacy of individuals. The second category at issue on this appeal is substantive and involves constitutional and policy considerations related to the right to confrontation, due process, and fairness. Most important, it is related to the risk of wrongfully convicting the innocent.

For the reasons and under the circumstances set forth in the *Darden* opinion we have concluded that, in the prob-

able cause cases, the proper balance between the defendant's rights and the competing interests of the state is achieved by granting an ex parte in-camera hearing with respect to the existence of the informer and the alleged communications from him. In the probable cause setting, there is no inflexible federal constitutional standard of disclosure applicable in every case involving an informant (*McCray* v. *Illinois*, 386 U.S. 300, 312-314; *cf.*, *People* v. *Malinsky*, 15 N Y 2d 86, 92-93).

When however, as in the case at bar the defendant's guilt or innocence is at issue, the decision as to whether the informant's identity should be disclosed must not be resolved in an ex parte proceeding.

Limiting the adversary stance in criminal prosecutions, the state is obliged to disclose to a defendant evidence and potential witnesses possessed by or known to the prosecution which may establish his innocence. (*Brady* v. *Maryland*, 373 U.S. 83, 86-87; see also *Moore* v. *Illinois*, 408 U.S. 786, 794-795). That such evidence or knowledge may involve prosecutorial privileges of one sort or another is to no avail (*Roviaro* v. *United States*, 353 U.S. 53, 60-61). The privileges must yield to the overriding consideration of avoiding the risk of convicting the innocent, unless, of course, the prosecution should elect to abandon its case rather than allow disclosure (*Id.* at 61 and 65, fn. 15).

Since this bears directly on the issues being tried in the main case, defendant's right to the full benefit of the adversary system should not be denied, nor qualified by impairing his right by interposing the "neutral" judge to assess whether the disclosure is relevant or material (cf., People v. Rosario, 9 N Y 2d 286, 290). On the other side of

the coin, it may be a disservice to the prosecution also to leave that determination to the "neutral" judge without the prosecution represented in in-camera proceedings.

Perhaps, most important, an in-camera examination of the witnesses, that is ex parte or without the parties represented would, in our view, arguably trifle with the constitutional right to confrontation and the right to counsel.

Nevertheless, these principles do not suggest or require that disclosure of privileged information concerning evidence or witnesses must be available for the asking. The *Roviaro* case (*supra*) makes it clear that some foundation, that is, some initial showing, must be made before privileged matter affecting the substantive issues must be disclosed, and that the issue is one to be determined in the exercise of a sound discretion by the trial judge (353 U.S. at 61, fn. 9, and 62).

Bare assertions or conclusory allegations by a defendant that a witness is needed to establish his innocence will not suffice. Instead he must show a basis in fact to establish that his demand does not have an improper motive and is not merely an angling in desperation for possible weaknesses in the prosecution's investigation (see *Roviaro* v. *United States* at 53-65, *supra*).

On this point the nature of the informant's role is of some significance. Undoubtedly the strongest case for disclosure is made out when it appears that the informant was an eyewitness or a participant in the alleged crime. (*Roviaro* v. *United States*, *supra*.) But disclosure of the informant's identity may also be appropriate when, by introducing the parties to each other or performing some other preliminary function he may be considered to have

been "an active participant in setting the stage". (*Gilmore* v. *United States*, 256 F. 2d 565, 567; see also *United States* v. *Roberts*, 388 F. 2d 646, 647, 649 [2d Cir.]; *Price* v. *Superior Court*, 463 P. 2d 721, 725, Calif. Sup. Ct.) When however he has played a marginal part by, for instance, merely furnishing a tip or some information to the police, the privilege should prevail absent an extremely strong showing of relevance. (See e.g. *Sorrentino* v. *United States*, 163 F. 2d 627; *Portemene* v. *United States*, 221 F. 2d 582, 583-584; *Gilmore* v. *United States*, *supra* at 566; *United States* v. *Lloyd*, 400 F. 2d 414, 416; *United States* v. *Barnett*, 418 F. 2d 309, 311.)

But although the extent of the informer's role cannot be overlooked, it should not be overemphasized. Thus when, for example, the identity of the culprit rests upon evidence which is equally balanced, the informer's testimony should not be minimized merely because he played an minor role. In other words the truly crucial factor in every case is the relevance of the informer's testimony to the guilt or innocence of the accused.

The defendant of course may lay his foundation for disclosure by a showing in pretrial motion or upon the development of testimony in the main trial. (With respect to a pretrial motion see *Roviaro* v. *United States*, *supra*, at 65 n. 15, and *People* v. *Taylor*, 70 Misc. 2d 970, 972.) It is impossible to predict every setting which would call for disclosure of the informer's identity. It is anticipated however that in the usual case either the course and quality of the prosecutor's proof may suggest the need for disclosure or the defendant, rather than showing weaknesses

in the prosecutor's case, might become entitled to disclosure by the development of his own defense.

In the *Goggins* case the right to disclosure was established on both of these grounds. In *Brown* disclosure was not justified on either ground, nor was there any other circumstance demonstrating that the defendant's demand was anything more than a purely speculative gesture designed to uncover evidence which might offer some support to his case or unveil some weakness in the prosecution.

Brown was convicted of selling drugs on two occasions to an undercover police officer. On the first occasion an informer took the officer to the defendant's apartment and told the defendant "this is my friend, take care of him." The informer left and the defendant sold cocaine to the officer. On the second occasion the informer waited downstairs while the officer returned to the defendant's apartment and once again purchased cocaine.

On the night of the arrest, the officer waited in a car while his back-up team escorted defendant from his apartment. The undercover officer viewed defendant through binoculars, and determined he was the person who had sold the officer the drugs. By a prearranged signal, the undercover officer blinked the headlights of the car. The back-up team then placed defendant under arrest. The undercover officer reconfirmed his initial identification of defendant by viewing him from approximately thirty feet away when he was being brought into the precinct house to be booked.

Goggins was also charged with selling drugs to an undercover policeman, Luther Barnes, on two occasions. Barnes testified that on the first occasion he went to a Brooklyn bar

accompanied by an informant who introduced him to a drug dealer and stated "Abdul, take care of my man." Leaving the informant behind, Barnes followed the dealer "Abdul" out of the bar and purchased drugs from him. Several days later Barnes and the informer returned to the bar. Once again the informant was left behind while "Abdul" and Barnes proceeded outside the bar where the second drug sale was completed. On both occasions Barnes was face to face with the dealer for approximately two minutes.

On the evening of defendant's arrest, Barnes left the bar and called his back-up team to tell them to arrest the seller who was in the bar. Barnes had previously described the seller to the back-up team, but his description of the seller on the evening of the arrest appears to be somewhat sketchy. The back-up team entered the bar at dusk, and arrested the defendant. As they walked out of the bar holding defendant, Barnes drove by them at approximately 15 miles per hour looking askance to make certain they arrested the right man. Satisfied they had the right man he left without returning to the precinct to make further identification. The next time Barnes saw the defendant was approximately one year later when he identified him in court as the man from whom he had bought the heroin.

In the *Goggins* case there were certainly gaps and weaknesses in the prosecutor's case. Police Officer Barnes gave but a sketchy description to his back-up team preceding the arrest, and except for a fleeting glance at the defendant made under less than favorable conditions, more than a year elapsed between the sale and the corporal identification of defendant by Barnes. Thus it was apparent that who was truly the man designated as "Abdul" was in issue

and that the defendant was entitled to disclosure of the name of the man who set up the sale by Abdul to the police officer and introduced them to each other. This informer could clearly play a decisive role in resolving the very colorable factual dispute between Barnes and Goggins. (See e.g. accord *Smith* v. *Illinois*, 390 U.S. 129, 130; *Portemene* v. *United States*, *supra* [cited with approval in *Roviaro* v. *United States*, *supra*, p 82, n 12]; cf. *United States* v. *Polisi*, 416 F 2d 573, 578-579 [2d Cir].)

The transaction in *People* v. *Brown* offers an appropriate contrast. In *Brown*, the sale was made in a particular apartment in which the defendant was found when arrested, rather than in a public bar as in *Goggins*. Most important, after the arrest in Brown, the officer who made the purchase went to the station house after the back-up team had arrested the defendant and identified him as the seller. Of these facts, the trial court properly exercised its discretion in denying disclosure. Here the risk of mistaken identification was minimal. Significantly the defendant has failed to focus on any weak point in the prosecutor's case or closely contested issue of fact which might be resolved by disclosure of the informant's identity.

Of course, as indicated, the defendant might become entitled to disclosure not by showing weaknesses in the prosecution case but by the development of his defense. Thus, in *Goggins*, defendant had no arrest record and was gainfully employed. Goggins also gave a creditable explanation for his presence in the bar when arrested, denied being present in the bar at the time of the sale, and was corroborated in this respect by his now estranged wife.

Brown, on the other hand, presented no significant defense and his demand for disclosure fails on this ground as well.

In sum the record in the *Goggins* case, but not in *Brown*, presents both a plausible issue as to guilt and less than trouble-free identification testimony, and either would have been enough. Hence, disclosure should have been directed in *Goggins*, and even, if appropriate, production of the informant-witness; *but since it relates to a substantive issue in the case, the disclosure should not be ex parte or without either party present even if in-camera.* Such a drastice requirement of full disclosure or production will, of course, influence the trial court's discretion lest the prosecutorial privileges be untowardly brushed aside; but that is fair enough since the privileges are important. Of course, if the prosecution concludes that conviction of the defendant is less important that the risks of disclosure, it will have to forego pursuing the case against the defendant.

The orders appealed from are affirmed.

JASEN, *J.* (dissenting):

I dissent and vote to reverse and to reinstate the judgment of conviction on the ground that the trial court did not abuse its discretion in denying defendant's request for disclosure of the informer's identity.

At about 3:00 P.M., on March 18, 1970, Luther Barnes, an undercover officer assigned to the Narcotics Division of the City of New York Police Department, entered a bar and grill located at Christopher and Belmont Streets,

Brooklyn. Accompanying Barnes was a confidential police informer. The informer introduced Barnes to a man addressed as Abdul by saying, "Abdul, take care of my man." Abdul then motioned to Barnes to follow him outside the bar. There the two conversed for several minutes and Abdul gave Barnes seven glassine envelopes, later determined to contain heroin, in exchange for $15. The informer remained inside the bar and did not participate in the negotiations or witness the transaction. After the exchange was completed, Abdul and Barnes reentered the bar. Barnes remained for several minutes more and then departed with the informer. He then rendezvoused with his backup team at a prearranged location and placed the glassine containers in an evidence envelope and sealed it. Detective Lorenzo, a member of the backup team, who had been seated in a parked car on Christopher Street approximately 50-60 feet from the intersection of Belmont Street, observed Barnes enter the bar and grill with the informer, emerge and converse and shake hands with another man and then reenter the bar. At trial, Barnes identified the defendant as the man Abdul who had sold him the heroin and Lorenzo identified the defendant as the man he had seen conversing and shaking hands with Barnes outside the bar.

This sequence was repeated on March 23, 1970. On that day at about 3:30 P.M., Barnes and the informer entered the same bar at Christopher and Belmont Streets. Abdul was present and motioned to Barnes to go outside the bar with him. A brief conversation ensued, glassine envelopes, later determined to contain heroin, and money were exchanged. The informer remained in the bar. He did not participate in the negotiations and did not witness the

transaction. There is no evidence that any words of introduction were spoken on Barnes' behalf as on March 18. As on the previous occasion, from a car parked about 50 feet away on Christopher Street, Detective Lorenzo observed Barnes and another man, identified at trial as the defendant, conversing and shaking hands outside the bar.

On March 27, 1970, at about 6:00 P.M., Barnes entered the same bar and observed the defendant known to him as Abdul. He remained for a few minutes and then reported to his backup team that the suspect was at the bar and furnished them a description. The backup team, Detective Lorenzo and another, then entered the bar and arrested the defendant. No drugs were found in his possession. Barnes then drove past the bar at about 15 miles per hour, observed the defendant in custody on the sidewalk outside the bar and signalled to the team that they had the right man.

At trial, the defendant denied having made sales of heroin on March 18 and March 23 or any other date. He testified that on each of these days he had been at home with his wife until 3:45 P.M. when he left for work. Defendant's wife testified to the same effect. On cross-examination, however, it was determined that during 1970 she and the defendant had not been living together continuously and that she could not recall exactly which days in March her husband had spent at home. The jury then returned a verdict of guilty of possession, possession with intent to sell, and sale of dangerous drugs incident to each of these two transactions (6 counts).

On this record I am unable to conclude, as does the majority, that disclosure of the informer's identity was re-

quired. In the interest of fairness, disclosure should be allowed where the informer is a material witness on the issue of guilt. *Roviaro* v. *United States*, 353 U. S. 53, 60-61.) But there is and cannot be any fixed rule for resolving this issue in particular cases. In the final analysis, each case turns on its own peculiar circumstances. (*Id.*, at p. 62.)

Here, unlike in the *Roviaro* case, the informer did not play a central role in the narcotics transactions. He merely brought Barnes and the defendant together on the first occasion. On neither occasion did he participate in the negotiations, nor was he even within hearing distance (see *Gilmore* v. *United States*, 256 F 2d 565, 567 [5th Cir.]) and he did not witness the most crucial step—the actual exchange of drugs—which occurred outside the bar. (See *United States* v. *Paz-Sierra*, 367 F 2d 930, 931 [2d Cir.]; *United States* v. *Russ*, 362 F 2d 843, 845 [2d Cir.].)

Then, too, while Barnes and, to a lesser extent, Lorenzo were vigorously cross-examined as to the accuracy of their identification of the defendant, it was never explained why disclosure of the informer's identity was warranted, which was defendant's burden to do.[1] (See generally, Anno., *Accused's Rights—Informer—Identity*, 76 A L R 2d 262, § 13[b] and cases collected therein.) In evaluating the trial court's exercise of discretion not to order disclosure, this is of some importance. (See *United States* v. *Kelly*, 449 F 2d 329, 330 [9th Cir.].)

---

[1] The existence of the informer was brought out only on cross-examination of Barnes. In presenting their case, the People did not rely in any manner on information supplied by the informer.

Also, the identification testimony was, in the main, quite sufficient. Barnes had two face-to-face encounters with the defendant. He observed him in the bar on the evening of the arrest and furnished a description to his backup team, one of whom (Lorenzo) had independently observed the defendant on the two prior occasions. Barnes also identified the defendant as he slowly cruised by the arrest scene. His in-court identification was positive and Lorenzo testified unequivocally that the man he arrested was the man whom he had observed conversing and shaking hands with Barnes on the dates and at the times that the drug transactions had occurred.

In balancing the public interest in protecting the flow of information against the individual's right to a fair trial, something more should be required before the privilege of nondisclosure gives way. Particularly in drug cases, informers play a crucial role and the privilege should yield only for the most cogent reasons. Indeed, it has been estimated that 95 percent of all Federal narcotics cases are obtained as the result of the work of informers. (Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecutions*, 28 Fordham L. Rev. 399, 403.) It is common knowledge that "victims" in narcotics cases rarely complain. Hence, in enforcing the narcotics laws, the State usually acts as policeman, prosecutor and complaining witness and of necessity must rely on informers, frequently drug users or sellers themselves, to lead its agents to others involved in the chain of illicit drug traffic. Of particular concern here is that the court holds disclosure is required where the informer merely brought the undercover agent and the drug seller together on one oc-

casion. The informer did not participate in the actual negotiations, nor did he witness the transactions. He was a mere catalyst, so to speak. Is disclosure to be required in every such case? If so, sources of valuable information will surely dry up and the ability of those in law enforcement to deal effectively with the drug problem and to penetrate the cadres of organized drug syndicates will be severely and irreparably impaired.

On this analysis, I do not reach the procedural issue with regard to a disclosure hearing. Were the issue reached, like the majority, I would hold that whether the informer's identity should be disclosed is a matter best resolved in the context of a full adversarial hearing.

For the reasons stated, the order of the Appellate Division should be reversed and the judgment of conviction reinstated.

* * * * *

In *People* v. *Goggins:*

Order modified in accordance with the opinion herein and, as so modified, affirmed. Opinion by WACHTLER, *J.* All concur except JASEN, *J.*, who dissents and votes to reverse in an opinion in which GABRIELLI, *J.*, concurs.

In *People* v. *Brown:*

Order affirmed. Opinion by WACHTLER, *J.* All concur, JASEN and GABRIELLI, *JJ.*, in result only.

APPENDIX B

Order of Reversal of The Appellate Division, Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 16, 1973.

A.D. 2

Before:

HON. JAMES D. HOPKINS,

Acting Presiding Justice,

" FRED J. MUNDER,
" J. IRWIN SHAPIRO,
" FRANK A. GULOTTA,
" MARCUS G. CHRIST,

Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

PHILLIP GOGGINS,

Appellant.

In the above entitled action, the above named Phillip Goggins, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County,

rendered June 11, 1971, convicting him of criminally selling a dangerous drug in the third degree (two counts), criminal possession of a dangerous drug in the fourth degree (two counts) and criminal possession of a dangerous drug in the sixth degree (two counts), upon a jury verdict, and imposing sentence; and the said appeal having been argued by Steven Lloyd Barrett, Esq., of counsel for the appellant, and by Roger Bennet Adler, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion by Shapiro, *J.*, decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law, and new trial ordered. MUNDER, GULOTTA, and CHRIST, *JJ.*, concur.

HOPKINS, *Acting P.J.*, concurs in the reversal and the direction of a new trial, but dissents from the direction for disclosure without an *in camera* hearing, with opinion.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX C

Opinion of the Appellate Division, Second Department

July 16, 1973

SUPREME COURT

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

42 A.D. 2d 227

HOPKINS, *Acting P.J.*,

MUNDER, SHAPIRO, GULOTTA and CHRIST, *JJ.*

THE PEOPLE, ETC.

Respondent,

v.

PHILLIP GOGGINS,

Appellant.

APPEAL from a judgment of the Supreme Court at Criminal Term in Kings County (WILLIAM T. COWIN, *J.*), rendered June 11, 1971, convicting defendant of criminally selling a dangerous drug in the third degree (two counts), criminal possession of a dangerous drug in the fourth degree (two counts) and criminal possession of a dangerous drug in the sixth degree (two counts), upon a jury verdict, and imposing sentence.

Appendix C—Opinion of the Appellate Division, Second Department

WILLIAM E. HELLERSTEIN and ROBERT KASANOF

(Steven Lloyd Barrett of counsel), for appellant.

EUGENE GOLD, DISTRICT ATTORNEY

(Roger Bennet Adler of counsel), for respondent.

SHAPIRO, *J.*

The defendant's conviction of various counts of an indictment involving the sale and possession of narcotics stems from two sales allegedly made by him to an undercover police officer, Luther Barnes. On the first occasion Barnes allegedly had a conversation with the defendant inside a bar and then went outside with him to consummate the sale. On the second occasion Barnes met the defendant inside the bar and motioned to him and they both went outside, where they consummated another sale.

Other police officers operating as Barnes' back-up team were unable to make independent identifications of the defendant as the man they had seen in conversation with Barnes. During cross-examination, Barnes testified that on the occasions of the sales he was accompanied to the bar by an informer who allegedly introduced him to the defendant and told the latter, "Abdul, take care of my man." The Trial Justice ruled that the informer's name did not have to be disclosed, as he was not present during the actual commission of the crimes.

The defendant was not in possession of any narcotics at the time of his arrest. He was employed as a hand baker at the times in question and had never previously been convicted of a crime. He contended that his implication in the

charges against him was a case of mistaken identity. Under these circumstances, we hold that the trial court's refusal to compel disclosure of the informant's name, so that he could be produced as a witness by the defendant, constituted reversible error necessitating a new trial.

In *Roviaro* v. *United States* (353 U. S. 53), the court recognized the public purpose to be served in protecting the identity of informants, but expressly held that where the informant, as in that case, had played an active role in bringing about the petitioner's arrest for possession of narcotics *and was present with the petitioner at the time of the occurrence of the alleged crime*, justice and fair play required his disclosure. Said the court (pp. 60-62):

> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."
>
> * * *
>
> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

In making such a balance in this case, we have concluded that disclosure of the informant's identity should have been ordered. Although the informant was not present at the actual sale, he allegedly introduced Barnes to the defendant and was present in the bar on each occasion when Barnes met the defendant. In the absence of other identification testimony, and in light of the defendant's denial that he had ever met Barnes, it is clear that disclosure of the informant's identity so that he could be called as a witness on the issue of mistaken identification is essential to a fair determination of this case.

We need not, in this case, set forth a general rule as to whether disclosure, when required, should take place in open court or at an *in camera* hearing. In *Alderman* v. *United States* (394 U.S. 165, 182-183, n. 14), there is an indication that compliance with *Roviaro* (*supra*) may be accomplished at an *in camera* hearing. (See concurring opinion by Hopkins, *J.*, in *People* v. *Delgado*, 40 A D 2d 554, for a discussion of procedures to be followed at such a hearing.)

In the federal system, the Third and Sixth Circuits of the Court of Appeals have remanded cases to the trial courts for *in camera* hearings in situations in which the informants were allegedly active participants in the criminal activities. The purpose of the hearing in each case was to determine whether the informant's testimony would have been material and helpful to the defendant in preparing his defense and whether the informant would have been available to testify (see *United States* v. *Lloyd*, 400 F. 2d 414 [6th Cir.]; *United States* v. *Jackson*, 384 F. 2d [3rd Cir.]). However, later, in *United States* v. *Barnett*

(418 F. 2d 309), the Sixth Circuit, in a similar case, reversed and ordered a new trial because of the failure to call the informant and no mention was made of the possibility of an *in camera* hearing; nor did it refer to its earlier cases on the subject.

Other Circuits of the Court of Appeals, in cases in which the informants were witnesses to the transactions, have simply reversed and ordered new trials, without directing an *in camera* hearing (see, e.g., *Velarde-Villarreal* v. *United States*, 354 F. 2d 9. [9th Cir.]; *Lopez-Hernandez* v. *United States*, 394 F. 2d 820 [9th Cir.]; *Gilmore* v. *United States*, 256 F. 2d 565 [5th Cir.]; cf. *United States* v. *Roberts*, 388 F. 2d 646 [2nd Cir.]).

As the informant's testimony here will be concerned with the identification of the defendant and cannot well be given without a direct confrontation, a remand for an *in camera* hearing, even if otherwise proper, would not be feasible. In any event, if, contrary to the defendant's claim that he knows of no informer because he was never introduced to Barnes, the latter is telling the truth, there would be no public purpose served in withholding the name of the informer, since his identity would already be known to the defendant.

Accordingly, the judgment of conviction should be reversed, on the law, and a new trial ordered.

HOPKINS, *Acting P.J.* (concurring in part and dissenting in part). I agree with my brethren that the judgment of conviction must be reversed and a new trial ordered. I differ from them concerning the procedure to be followed on the new trial.

Appendix C—Opinion of the Appellate Division, Second Department

The identity of an informant must be disclosed to the defendant in a criminal action when it is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause" (*Roviaro* v. *United States*, 353 U.S. 53, 60-61). That admittedly general test is rounded out more significantly in the language of the court in *Wilson* v. *United States* (59 F. 2d 390, 392): "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled."

Nonetheless, the rule istelf is but an exception to a larger doctrine—the common law privilege extended to a police informer against disclosure (see 8 Wigmore, Evidence [McNaughton rev.], § 2394). That privilege is intended to encourage assistance to the State in rooting out and prosecuting crime; moreover, in modern context, the priviiege protects the undisturbed use of undercover agents and ongoing investigations and prevents retaliation against informers and their families by coercive means employed by the accused or his associates.

Thus, whether the exception allowing disclosure may be given effect becomes essentially a balancing process to strike the proper breaking point between the interest of the State and the interest of the individual—the traditional role of due process under the Constitution. It is the trial court which must decide whether the exception shall be recognized for the proper safeguard of the individual at the trial. In order that the balancing test can be fairly determined between the competing interests, the proceedings by which the test is carried out should be held *in*

camera, without the presence of the prosecutor or the defendant and his counsel (cf. *People* v. *Delgado*, 40 A D 2d 554).[1]

In camera procedure is sanctioned by the federal courts (*United States* v. *Jackson*, 384 F. 2d 825, cert. den. *sub nom. Jackson* v. *United States*, 392 U. S. 933; *United States* v. *Winters*, 420 F. 2d 523; cf. *United States* v. *Day*, 384 F. 2d 464, 470 [(concurring opinion)]; *United States* v. *Bell*, 464 F. 2d 667; *United States* v. *Slocum*, 464 F. 2d 1180). "Realistically, the trial court can perform its function only if it has access to more of the facts than it may ultimately be willing to reveal to the parties or to the public. To deny the judge the identity of the informer and whatever evidence he may be able to offer may prevent an effective evaluation of possible effect on the defendant's interests" (*United States* v. *Lopez*, 328 F. Supp. 1077, 1091).[2]

Moreover, the procedure has received approval in the Federal Revised Proposed Rules of Evidence. Rule 510 (subd. [c], par [2]) provides that "the judge shall give the government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. * * * Evidence sub-

1. The absence of the defendant does not violate the confrontation clause of the Constitution of the United States (*McCray* v. *Illinois*, 386 U. S. 300, 313-314).

2. *In camera* procedure has also been adopted in civil cases (*Westinghouse Elec. Corp.* v. *City of Burlington*, 351 F. 2d 762).

mitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera*, at which no counsel or party shall be permitted to be present."

Hence, in this case I would direct that an *in camera* hearing be held in connection with the new trial, in order to determine whether disclosure should be required. The Trial Justice, after obtaining the facts, is in a far better position to make that decision than we are on this record. I therefore concur in the reversal and the direction of a new trial, but dissent from the direction for disclosure without an *in camera* hearing conducted under the conditions stated herein.